BMC Construction Sdn Bhd v Dataran Rentas Sdn Bhd

HIGH COURT (PULAU PINANG) — COMPANY WINDING-UP NO 28–87 OF 1998
JEFFREY TAN J
14 JULY 1999

Companies and Corporations *— Winding-up — Petition under s 218 — Bona fide dispute — Progress payment certificates issued — No right of set-off or cross-claim — Whether petition should be allowed —*

Companies and Corporations *— Winding-up — Solvency of company — Respondent to rebut presumption of inability to settle debt — Letters from bankers stating outstanding amounts on banking facilities — Whether sufficient to show solvency*

The petitioner filed a winding-up petition to wind-up the respondent company on the ground that the respondent was unable to pay its debts. The respondent was alleged to be indebted to the petitioner in the sum of RM173,096.18 in respect of four unpaid progress payment certificates for building works executed by the petitioner and demanded in the notice pursuant to s 218 of the Companies Act 1965. In opposing the petition, the respondent alleged that it had a cross-claim or set-off against the petitioner for loss and damage for defective works. The respondent also produced letters from its bankers stating the outstanding amounts on its banking facilities and receipt of payment from one of the respondent's creditors dated in 1997 to evince that it was solvent and had the means to settle the claim of the petitioner.

Held, ordering that the respondent be wound up:

(1) In order to oppose the winding-up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds (see p 362B). Quite clearly so far as the four progress payments were concerned, the respondent was truly indebted to the plaintiff, there could be no bona fide dispute (see p 365B). This is because the petitioner was entitled to payment in full of the sums stated in the four progress payment certificates. There were no provisions in the conditions of the agreement between the plaintiff and the respondent for cross-claims in the nature of the present cross-claim to be set-off or deducted from the amounts due under any progress payment certificate. The cross-claim was also not yet made and still to be litigated or arbitrated at the end of the day (see p 365A–B); *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 followed.

(2) To prove its ability to pay its debts and to rebut the presumption of its inability, the respondent should state its assets and liabilities.

But all the respondent produced were three letters from its bankers stating the outstanding amounts on its banking facilities and a two year old receipt, hardly any material or sufficient material to find that the respondent has the ability to pay its debts (see p 367D–E).

[**Bahasa Malaysia summary**

Pempetisyen telah memfailkan satu petisyen penggulungan untuk menggulung syarikat responden atas alasan bahawa responden tidak dapat membayar hutang-hutangnya. Responden dikatakan terhutang kepada pempetisyen dalam jumlah sebanyak RM173,096.18 berhubung dengan empat sijil bayaran yang tidak berbayar bagi kerja-kerja pembinaan yang disempurnakan oleh pempetisyen dan dituntut dalam notis selaras dengan s 218 Akta Syarikat 1965. Dalam membantah petisyen tersebut, responden mendakwa bahawa ia mempunyai tuntutan balas atau penolakan terhadap pempetisyen kerana kerugian dan gantirugi bagi kerja-kerja yang tidak sempurna/cacat. Responden juga mengemukakan surat-surat daripada jurubanknya yang menyatakan baki yang masih belum digunakan atas kemudahan-kemudahan perbankannya dan penerimaan pembayaran dalam tahun 1997 daripada salah satu pemiutang-pemiutang responden bagi membuktikan bahawa ia solven dan bahawa ia mempunyai keupayaan untuk menjelaskan tuntutan pempetisyen.

Diputuskan, memerintahkan supaya responden digulung:

(1) Bagi membantah petisyen penggulungan, responden mesti membangkitkan pertikaian bona fide dalam kedua-dua cara subjektif dan juga objektif. Pertikaian sedemikian sesungguhnya mestilah dipercayai wujud dan semestinya berdasarkan alasan-alasan yang substansial atau berpatutan (lihat ms 362B). Sejauh mana ia berkaitan dengan empat pembayaran tersebut, adalah agak jelas, responden sesungguhnya terhutang kepada plaintif, maka tidak terdapat sebarang pertikaian bona fide (lihat ms 365B). Ini adalah kerana pempetisyen berhak untuk mendapat pembayaran penuh akan jumlah-jumlah yang dinyatakan di dalam empat sijil pembayaran tersebut. Tidak terdapat peruntukan dalam syarat-syarat perjanjian antara plaintif dan responden bagi tuntutan balas seperti tuntutan balas semasa untuk ditolak daripada jumlah-jumlah yang kena dibayar di bawah mana-mana sijil pembayaran tersebut. Tuntutan balas tersebut juga masih belum dibuat dan masih menunggu untuk dilitigasikan atau ditimbangtara (lihat ms 365A–B); *Pembinaan Leow Tuck Chai & Sons Sdn Bhd v Dr Leela's Medical Centre Sdbn Bhd* [1995] 2 MLJ 57 diikut.

(2) Untuk membuktikan keupayaannya untuk membayar hutangnya dan untuk mematahkan tanggapan ketidak-upayaannya,

responden sepatutnya menyatakan aset-aset dan tanggungan-tanggungannya. Tetapi apa yang hanya dikemukakan oleh responden adalah tiga pucuk surat daripada jurubanknya yang menyatakan jumlah-jumlah masih belum jelas pada kemudahan-kemudahan perbankannya dan satu resit yang bertarikh dua tahun yang lalu, tidak terdapat apa-apa material atau material yang secukupnya untuk menunjukkan bahawa responden mempunyai keupayaan untuk membayar hutangnya (lihat 367D–E).]

Notes

For cases on petition under s 218, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1049–1062.

For a case on solvency of company, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1115.

Cases referred to

Bandar Raya Developments Bhd v Woon Hoe Kan & Sons Sdn Bhd [1972] 1 MLJ 75 (refd)

Campana Distributor Sdn Bhd v Amseal Engineering (M) Sdn Bhd [1998] 7 MLJ 677 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Dawnays Ltd v FG Minter [1971] 1 WLR 1205 (refd)

DMCD Museum Associates Sendirian v Shademaker (M) Sdn Bhd [1999] 1 CLJ 399 (refd)

Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd [1986] 1 MLJ 177 (refd)

Frederick Mark Ltd v Schild The Times 21 October 1971(London) (refd)

Great Britain Mutual Life Assurance Society, Re (1880) 16 Ch D 246 (refd)

Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd [1990] 1 MLJ 21 (refd)

KSM Insuran v Ong Ah Ba & Anor [1986] 1 MLJ 237 (refd)

Kumagai Gumi Co v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789 (refd)

Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd [1988] 2 MLJ 449 (refd)

Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53 (refd)

Mondel v Steel (1841) 8 M & W 871 (refd)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (refd)

New South Wales Rugby League v United Telecasters Sydney Ltd 4 ACSR 510 (refd)

Nima Travel Sdn Bhd, Re [1986] 2 MLJ 374 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (folld)
Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd [1991] 3 MLJ 309 (refd)
Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd [1994] 3 AMR 2554 (refd)
Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1992] 1 MLJ 313 (refd)
System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd [1999] 1 AMR 1187 (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat t/a Juta Benas [1996] 1 CLJ 231 (refd)
Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd [1989] 3 MLJ 216 (refd)

Legislation referred to

Companies Act 1965 s 218, (1)(e), (2)(a)
Rules of the High Court 1980 O 14

Karin Lim (*Lim Leng Han & Co*) for the petitioner.
Ong Kah Lee (*Tharumal & Co*) for the respondent.

Jeffrey Tan J. : This the petitioner's petition dated 16 September 1998, for an order winding up the respondent company, on the ground that the respondent is unable to pay its debts. The background facts and arguments appear as follows.

According to the petitioner, the respondent is indebted to the petitioner in the sum of RM173,096.18, it being the sum due and owing to the petitioner in respect of four unpaid progress payment certificates (payment certificates Nos 5–8) for building works executed by the petitioner and it also being the sum demanded from the respondent by the petitioner's s 218(2)(a) of the Companies Act 1965 ('the Act') notice dated 29 July 1998, the respondent has for three weeks upon receipt of the said notice neglected to pay the said sum, and, is unable to pay its debts.

In its affidavits opposing the petition, the respondent denied that the sum of RM173,096.18 is due and owing to the petitioner. The respondent exhibited: (i) the respondent's reply dated 31 July 1998 (encl 11 exh 'T-1') to the petitioner's statutory notice; and (ii) the respondent's writ of summons dated 29 October 1998 (encl 11 exh 'T-2') claiming from the petitioner for loss and damage for defective works allegedly executed by the petitioner. The respondents contended that by reason of the defective works, the respondent would not pay the claim even though able to do so, as the claim is in dispute, and, that this petition was presented 'to put pressure on the respondent'. 'The petitioner's claim should be arbitrated.' The respondent further contended that the petitioner is not registered with the Lembaga Pembangunan Industri Pembinaan Malaysia and so could not

claim against the respondent, that despite several demands the petitioner had failed to furnish a performance bond, that the claim of the petitioner is far in excess of the actual work done, that the respondent is finalising an action against the architect, that this court is not the proper forum to adjudicate on the dispute, that the respondent has proof that the claim of the respondent was not an afterthought, and that the letters of Hock Hua Bank Bhd (encl 19 exh 'T-6') evince that the respondent has the means to settle the claim of the petitioner, that the respondent is not a creditor within the meaning of s 218 of the Act, that a further letter of the Hock Hua Bank Bhd (encl 30 exh 'T-8') evince that the respondent is still solvent, that the respondent's payment (encl 32 exh 'T-9') to its contractor is proof of the sound financial standing of the respondent, and, that the quantity surveyor's report says (encl 24 exh 'T-7') that the petitioner is indebted to the respondent in the sum of RM55,023.79.

In its affidavits, the petitioner contended however, that the sum of RM173,096.18 is due and owing pursuant to interim certificates issued by the respondent's architect, that those payment certificates confer temporary finality, that the petitioner is entitled to immediate payment in full, and, that the reply (encl 11 exhibit 'T-1') and claim were afterthoughts. The petitioner had not breached the contract and had replied, on the 12 August 1998 (see encl 14 exh 'YHM-8'), to the respondent's allegations. The respondent's architect admitted that there were outstanding payments (see encl 2 exh 7A). Defective works were not alleged at all in the respondent's reply. The respondent's action was filed only after the presentation of this petition and after the petitioner had terminated the contract by reason of the non-payment of the certificates for payment. There was no notice of any defective works. The alleged defects are not defects at all. There are no defects. In any event, the contract had been terminated for non-payment and the petitioner 'is not liable for the defects'. The respondent's claims are baseless. The petitioner's claim cannot be disputed. Defective works are being raised to deny payment to the petitioner. There could not be any cross-claim exceeding the petitioner's claim. It is too late for arbitration. The petitioner has applied for a licence from the Lembaga Pembangunan Industri Pembinaan Malaysia. In any event, the licence is irrelevant to the claim of the petitioner and does not invalidate the contract. The performance bond was not a term in the letter of award. The petitioner was allowed to commence works without the performance bond. The performance bond was waived. The works were certified according to the work done. Part payments had been made, but because of its inability to pay the petitioner, the respondent had raised baseless allegations. The letters of the bank do not show that the respondent is solvent. The respondent is insolvent. The last audited accounts (encl 16 exh 'YMC-1') shows that the respondent is insolvent.

Ms Karin Lim for the petitioner highlighted that the respondent, as of 30 June 1996, has an accumulated loss of RM28,568, and that the entire share capital of the respondent has been wiped out. And 'that loss has not even taken this debt under the four interim certificates into account'. She further underscored that there is an admission to the debt. She also

submitted, that all interim certificates must be paid as and when they become due, that the quantity surveyor but not the supervising officer estimated the costs of the alleged repairs (RM65,650), that the total sum retained to date stands at RM71,429.70, and, that even if there are defects the retention sum is more than enough to absorb these so-called defects. She further submitted that there is no bona fide dispute, that those interim certificates cannot be disputed, that the failure to pay those certificates exposed the respondent to a s 218 petition, and, that the so-called defects were only brought up after the s 218 notice.

In his written and oral submission, Mr Ong Kah Lee for the respondent responded, that the petitioner 'is not a creditor clothed with locus standi to present a petition ab initio even if the [respondent] is insolvent', that the respondent has not neglected to pay its debts 'since the claim by the petitioner has been bona fide disputed on substantial grounds', that 'there is a dispute because there are contradictory assertions', that the performance bond was not furnished, that this winding up petition cannot 'be an issue at hand [prior to the disposal of the respondent's claim]', that alternatively, the court may stay this petition, that this petition to enforce payment of a disputed debt is an abuse of the process of the court, that the respondent has a bona fide cross-claim and that 'the petitioner is not entitled to a winding-up order in which the cross-claim should be decided at trial in a separate action', 'that overall assets and liability test is the proper test to ascertain insolvency … and that it is the burden of the petitioner to prove to the satisfaction of the court that the respondent is unable to pay its debts', that the respondent has overdraft and bridging facilities, and that there are two objectors to this petition.

Ms Lim replied that the performance bond was waived as the petitioner was allowed to perform the contract, that all complaints arose only after the certificates became due, that merely saying there is a dispute is not enough, and, that it is the duty of the court to order winding up.

The respondent's point of view is that a dispute automatically arises whenever there are opposing assertions. Perhaps it is true, that whenever there are opposing assertions, there is no agreement on the matters diametrically asserted. Perhaps, in that sense of argument, debate or controversy, it is true that there is dispute whenever there are opposing assertions. But it is patently not true that a bona fide dispute automatically arises whenever there are opposing assertions. For whether or not there is a bona fide dispute wholly depends upon the evidence (see *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 at p 449). '… The debt must be disputed on some substantial grounds …' (*Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95 at p 97 per Hashim Yeop A Sani CJ). The facts must indicate that there is a substantial dispute (*Re Nima Travel Sdn Bhd* [1986] 2 MLJ 374 at p 376). '… It is not sufficient … to say, 'We dispute the claim' '. [The respondent] must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in an action, or by some other proceeding' (*Re Great Britain Mutual Life Assurance Society* (1880) 16 Ch D 246 at p 253, per Jessel MR).

'Dispute means not just differences arising out of a party's refusal to do something but controversy over contestable matters. Mere refusal to pay is not a dispute. See the cases of *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 and *KSM Insuran v Ong Ah Ba & Anor* [1986] 1 MLJ 237, both decisions by George J [as he then was]' (*Perbadanan Kemajuan Negeri Perak v Asean Security Paper Mills Sdn Bhd* [1991] 3 MLJ 309 at p 314, per Hashim Yeop A Sani CJ, and cited in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat t/a Juta Benas* [1996] 1 CLJ 231 at p 236). 'The dispute must be bona fide in both a subjective and objective sense. Thus it must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous and which the court should therefore ignore' (*Palmer's Company Law* (23rd Ed) at p 1117; see also *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] 3 AMR 2554 at p 2557). To just say 'we dispute the claim', is most definitely not enough.

But 'where there is a bona fide dispute as to the debt, the company cannot be said to have neglected to pay on a statutory notice' (*Palmer's Company Law* (23rd Ed) at p 1117), and a petition based on a debt which is disputed on substantial grounds will fail (see *Kumagai Gumi Co v Zenecon-Kumagai Sdn Bhd & Ors & another application* [1994] 2 MLJ 789).

In *Campana Distributor Sdn Bhd v Amseal Engineering (M) Sdn Bhd* [1998] 7 MLJ 677, the respondent disputed their indebtedness to the petitioner, on the ground of late delivery and defects of the tiles. There, the respondent submitted that in view of their claim for damages, the amount of which was greater than the petitioner's claim, the respondent would not have to pay any monies to the petitioner. Here, the respondent contended, that they have a claim against the petitioner for loss and damage for defective works, and that in view of that claim the respondent would not pay the petitioner even though able to do so. But it would appear that the respondent and Mr Ong had given rather short shrift to the four progress payment certificates.

A further but now leading case in which the employer alleged defective works was *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57. In that case, the employer alleged that the contractor had used defective materials and had executed the work poorly, and refused as such to pay the amount stated in the penultimate progress payment certificate issued by the architect. The Federal Court held that the issue of central importance was whether, in O 14 proceedings, upon the construction of the building contract dated 27 April 1989, there was an obligation imposed upon the employer to pay at once the sum appearing in the penultimate certificate, regardless of pending disputes, including cross-claims which allegedly exceeded the sum certified for payment. As in the present case, the contract provided that the contractor shall be paid the sum so certified within a certain time from the date of the presentation to the employer of an interim certificate.

Aptly, in deciding that issue, the Federal Court per Edgar Joseph Jr FCJ made several significant pronouncements on the status of progress payment

certificates, which so often are not honoured, for one reason or another. One, it is that an interim certificate or any certificate issued by an architect or engineer pursuant to provisions of the RIBA and other known forms of building contracts and sub-contracts are not to be treated virtually as cash like a bill of exchange (see p 1311). In the opinion of the Federal Court, 'there is no special rule of construction operating in building contract cases … which lays down that contracts with provision for payment on certificates negative the ordinary common law right of set off enunciated in *Mondel v Steel* (1841) 8 M & W 871 at p 872'. Two, it is that there is no special rule of construction applicable to cross claims in the building contract cases, which operates in the opposite direction to the principle laid down in Mondel v Steel [ibid]. Three, it is that interim certificates have 'temporary finality' and a right to immediate payment in full in the absence of an express contractual provision permitting deduction of the matter in question. And four, it is that the employer or main contractor's cross claims, notwithstanding the temporary finality of the interim certificates, are not prevented from being litigated or arbitrated, at the end of the day.

Clearly, it was the judgment of the Federal Court, that an employer or main contractor may only deduct or set off if there are express provisions in the contract or sub-contract for a deduction or set off, and even then limited only to the scope of the permitted deductions or set offs. And that marked a significant shift from the previous position of the Federal Court in *Bandar Raya Developments Bhd v Woon Hoe Kan & Sons Sdn Bhd* [1972] 1 MLJ 75 at p 76, per Ong Hock Sim FJ, where it was held, that 'a debt due under an interim payment certificate [is] a debt of a class which ought not to be allowed to be made the subject of set off or counterclaim'.

That significant shift was not unnoticed in *DMCD Museum Associates Sendirian v Shademaker (M) Sdn Bhd* [1999] 1 CLJ 399, where Kamalanathan Ratnam J lamented that the decision in *Bandar Raya Developments Bhd* was not referred to the Federal Court in *Pembenaan Leow Tuck Chui*. But really, even if referred to, it would not have made any difference. It would still have been the same. In *Bandar Raya Developments Bhd*, the appellants sought to distinguish the facts of *Dawnays Ltd v FG Minter* [1971] 1 WLR 1205 and argued that there is provision in the contract for permitted deductions, and that such sums may be set off against sums due under interim certificates. In other words, it was advocated well ahead of its time in *Bandar Raya Developments Bhd*, that which would be held, much much later, in Pembinaaan Leow Tuck Chui. But the Federal Court referred to the case of *Frederick Mark Ltd v Schild* (London) Times 21 October 1971, where the English Court of Appeal referred to *Dawnays Ltd v FG Minter* [1971] 1 WLR 1205 and 'categorically stated that [it] agreed with every word Lord Denning said', and held, in line with *Frederick Mark* and *Dawnays*, that 'a debt under an interim payment certificate [is] a debt of a special class which ought not to be allowed to be made the subject of set-off or counterclaim'.

However, the Federal Court in *Pembenaan Leow Tuck Chui* had a very different view of *Dawnays*. At p 1311, the Federal Court in *Pembenaan Leow Tuck Chui* said:

With all due respect to Lord Denning, for the reasons stated in the later House of Lords case of *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, we are unable to agree with him that an interim certificate or indeed any certificate issued by an architect or engineer pursuant to provisions of the RIBA and other known forms of building contracts and sub-contracts are to be treated virtually as cash like a bill of exchange.

In our view, therefore, there is no special rule of construction operating in building contract cases — such as was advocated by Lord Denning by way of obiter dictum in the *Dawnays* case — which lays down that contracts with provision for payment on certificates negative the ordinary common law right of set-off enunciated in *Mondel v Steel*.

In other words, we agree with the following passage in the judgment of Lord Morris in the *Gilbert-Ash* case:

> 'When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts: … Nor, if a contract provides for the issuing of interim certificates, should it be supposed that debts of a special class will come into existence, ie debts in relation to which there cannot under any circumstances be any defence or set off. Provisions governing such interim certificates will probably be found in the contract.'

It would not have been otherwise. The Federal Court in *Pembenaan Leow Tuck Chui* would not have been influenced by *Bandar Raya Developments Bhd*. The current view is that 'the express enumeration of permitted set offs in a contract or sub-contract, *can* imply [and that would depend on the construction of the particular contract] that a defendant builder or main contractor, as the case may be, is limited to making such deductions from the amounts claimed as fall strictly within the scope of the permitted set offs, and nothing else, on the basis of the *expressio unius* principle' (see *Pembinaan Leow Tuck Chui* (ibid) at p 1316). 'Where a building contract or sub-contract contains a set-off clause, it entitles employer of sub-contractor (within the permitted set-offs) to set-off claims certified as due to contractor or sub-contractor' (*Problems in Construction Claims* by Vincent Powell-Smith at p 127).

The view across the causeway is the same. In *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 3 MLJ 216 at p 220, the Singapore High Court held, 'In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate'. On appeal (*Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 2 MLJ 70), the Singapore Court of Appeal referred to Gilbert-Ash and upheld the right of set off.

At p 75, the Singapore Court of Appeal per Karthigesu J said:

> … cross-claims or counterclaims, not the subject of the architects' certification giving the right of immediate payment or deduction, are to be separately litigated or arbitrated.

There could be no doubt. The petitioner was entitled, in the present case, to payment in full of the sums stated in the four progress payment

certificates 'within 30 days' (see condition 30(1) of the articles of agreement read together with the appendix to the conditions of agreement — encl 11 exh 'T-4') of the presentation of those certificates. There were no provisions in the conditions of the Agreement for cross-claims in the nature of the present cross-claim to be set off or deducted from the amounts due under any progress payment certificate. The respondent could not withhold payment of the said progress payment certificates on account of its cross-claim, a cross-claim that yet was not made and still to be litigated or arbitrated at the end of the day, ie, after payment first of the progress payment certificates. Quite clearly, so far as the four progress payments are concerned, that the respondent was and is truly indebted to the petitioner, there could be no bona fide dispute. And there is no bona fide dispute regarding the indebtedness imputed against the respondent. Those progress payment certificates had temporary finality, and other than the one bare statement that the respondent would be instituting action against the architect, there is not a scrap of evidence, indeed no such evidence was put forward, that the sums mentioned in the certificates were erroneous by reason of any fraud, dishonesty or fraudulent concealment relating to the works, or any part thereof, or to any matter dealt with in the said progress payment certificates. Unquestionably, there was an undisputable debt and it was not paid. It has been said, 'that a creditor who cannot get paid is more or less entitled as of right to a winding-up order' (*New South Wales Rugby League v United Telecasters Sydney Ltd* 4 ACSR 510 at p 511, per Young J). Perhaps, it has been over-stated. But still, as an unpaid and unsatisfied creditor, the petitioner was entitled to demand for payment of the undisputable debt from the respondent, and to present, if its demand was not met, this winding-up petition (on that right of an unpaid creditor to petition for a winding-up order, see *Morgan Guaranty Trust* at p 97). So how could Mr Ong say that this unsatisfied creditor of an undisputable debt had filed this petition to put pressure on the respondent to pay the debt? It could not be more unreasonable.

There is no dispute that the petitioner demanded from the respondent, on 29 July 1998, for payment within 21 days of the sums mentioned in the four progress payment certificates. There is also no dispute that the said demand for a sum exceeding RM500 was not paid for three weeks thereafter the demand. And for the reasons aforesaid, the respondent could not pay the sum demanded. The requirements of s 218(2)(a) of the Act have been met. Prima facie, and that pursuant to s 218(2)(a) of the Act, the respondent 'shall be deemed to be unable to pay its debts'. As the Federal Court stated in *Sri Hartamas Development Sdn Bhd v MBf Finance Bhd* [1992] 1 MLJ 313 at p 318, per Gunn Chit Tuan SCJ (as he then was), 'the presumption of insolvency … arises if the requirements of the section relating to the demand have been complied with'. Without any bona fide dispute, 'it is for the [respondent] to prove that it is able to pay its debts' (*Sri Hartamas* at p 320).

And in dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, the Federal Court in *Sri Hartamas* followed the Privy Council in the case of *Malayan Plant (Pte)*

Ltd v Moscow Narodny Bank Ltd [1980] 2 MLJ 53, and cited the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:

> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Siti Norma Yaakob J (as she then was), in *Hotel Royal Ltd Bhd v Tina Travel & Agencies Sdn Bhd* [1990] 1 MLJ 21, further elucidated:

> The scope or the meaning to be given to the phrase 'unable to pay its debts' appearing in s 218(1)(e) of the Companies Act 1965 is explained by McPherson J in his book *The Law of Company Liquidation* (3rd Ed) at p 54 as follows:
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> > 'The phrase 'unable to pay its debts' is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets. But to require proof of this in every case would impose upon an applicant the near-often impossible task of establishing the true financial position of the company, and the weight of authority undoubtedly supports the view that the primary meaning to the phrase is insolvency in the commercial sense — that is inability to meet current demands irrespective of whether the company is possessed of assets which, if realized, would enable it to discharge its liabilities in full,"
>
> … the test for the insolvency of the respondent does not depend on the presence of their realizable assets.

'In short, the question is not whether the debtor's assets exceed his liabilities as appeared in the books of the debtor, but whether there are moneys presently available to the debtor, or which he is able to realize in time, to meet the debts as the become due. It is not sufficient that the assets might be realizable at some future date after the debts have become due and payable' (*Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449 at p 454, per Seah SCJ). The test of commercial '... insolvency simply means that [the respondent] a company is unable to meet its current debts as they fall due' (*System Communication Engineering Sdn Bhd v Zabidin Sdn Bhd* [1999] 1 AMR 1187 per Abdul Malik Ishak J at p 1189).

Towards proof of its solvency, the respondent exhibited three letters from Hock Hua Bank Bhd (encl 19 exh 'T-6', encl 30 exh 'T-8') and official receipt (encl 32 exh 'T-9') from one Sunway PMI-Pile Construction Sdn Bhd. Those letters from Hock Hua Bank Bhd, addressed 'to whom it may concern', say that the respondent, up until 3 May 1999, had overdraft (RM700,000) and bridging loan (RM2,100,000) facilities from Hock Hua Bank Bhd, and that the outstanding amounts on the overdraft and bridging facilities, as of 4 May 1999, were RM215,496.75 and RM59,320.90 respectively, whilst the official receipt of Sunway PMI-Pile Construction

Sdn Bhd says that Sunway PMI-Pile Construction Sdn Bhd received RM207,601.19 from the respondent on 22 July 1997.

As McPherson J perceptively stated in his book *The Law of Company Liquidation* (3rd Ed) at p 54, to require proof from a petitioner that the respondent is financially insolvent in the sense that its liabilities exceed its assets, would impose upon the petitioner the often impossible task of establishing the true financial position of the respondent, and so pragmatically the weight of authority supports the view that the primary meaning to the phrase 'unable to pay its debts' is the inability to meet current demands. And that inability to meet current demands is presumed, again a pragmatic approach, if the requirements of the s 218(2)(a) of the Act have been complied with.

On the other hand, for the respondent to prove its commercial solvency in the sense that its assets exceed its liabilities, would not be a burden at all. Its true financial position is within its own knowledge. That, the respondent knows best. A full and frank disclosure of its assets and liabilities by the respondent would show, if the respondent is indeed solvent, that the respondent is solvent. For given the statutory presumption against its ability to pay its debts, and that it must prove its ability to pay its debts, the respondent could not be economical with the truth. After all, only truth cannot be contradicted. To prove its ability to pay its debts and so rebut the presumption of its inability, the respondent should state its assets and liabilities. But all that the respondent produced were three letters from its bankers stating the outstanding amounts on its banking facilities and a two year old receipt (dated 22 July 1997) stating that Sunway PMI-Pile Construction Sdn Bhd received RM207,601.19 from the respondent on 22 July 1997, hardly any material or sufficient material for to find that the respondent has the ability to pay its debts. The overdraft loan facility might be a credit line to the respondent, and the bridging loan facility might be resources to pay out some claims. But loan facilities are not assets in the true sense of the word. Every Ringgit overdrawn or drawn down must be repaid. And those three letters from Hock Hua Bank Bhd say that the respondent is already substantially indebted (the outstanding sums already overdrawn and drawn down) to the bank, and that the respondent has a balance credit line, in other words, that the respondent has the capacity to further enlarge its indebtedness to the bank. But not a word was said by the respondent on its total assets and total liabilities, and, as to how those loans would be repaid. It was not even said if those banking accounts are still maintained. As for the two year old receipt, it merely shows that the respondent made a payment two years ago. What is clearly established, however, is that the respondent failed on four consecutive occasions to honour the progress payment certificate presented, which is itself evidence of the respondent's inability to pay its debts, and, that the respondent neglected, despite the statutory demand of the petitioner, to pay the sum demanded, which gives rise to the presumption that the respondent is unable pay its debts. But all too skimpy, the respondent has not rebutted that presumption.

The only final order that a court may make, when hearing a winding-up petition, is to '... direct a winding up or to dismiss the petition' (see *Teow*

Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 at p 604). Accordingly, and for the reasons given above, it is hereby ordered that the respondent be wound up under the provisions of the Companies Act 1965, that the official receiver be appointed the provisional liquidator for the purpose of the said winding up, and, that the costs of the petition be taxed and paid to the petitioner out of the assets (if any) of the respondent.

Respondent ordered to be wound up.

Reported by Moy Saw Han